Office-Supreme Court, U.S.
FILED
AUG 5 1981
ALEXANDER L. STEVAS, CLERK

Nos. 80-1979, 80-1981, 80-1983, and 80-2024

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES TAMER, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES ABRAHAM, PETITIONER

v.

UNITED STATES OF AMERICA

CHARLES GOLDFARB, PETITIONER

v.

UNITED STATES OF AMERICA

ALADDIN HOTEL CORP., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the instructions permitted the jury to convict petitioners of Travel Act offenses solely on the basis of state gaming commission regulations (Nos. 80-1979 and 80-1983).

2. Whether the instructions presented a theory of illegality not charged in the indictment (No. 80-1983).

3. Whether the instructions permitted conviction on a less than unanimous verdict (Nos. 80-1979 and 80-1983).

4. Whether under the facts of this case, the court abused its discretion in permitting cross-examination of a defense character witness on a specific act of misconduct by petitioner Abraham (No. 79-1981).

5. Whether a corporation may be convicted of conspiring with its agents to violate the Travel Act (No. 80-2024).

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Statement	2
Argument	4
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Egan v. *United States*, 137 F.2d 369, cert. denied, 320 U.S. 788	14
Michelson v. *United States*, 335 U.S. 469	12
Mininsohn v. *United States*, 101 F.2d 477	14
Nelson Radio & Supply Co. v. *Motorola, Inc.*, 200 F.2d 911, cert. denied, 345 U.S. 925	13
Nye & Nissen v. *United States*, 336 U.S. 613	14
Poller v. *Columbia Broadcasting System, Inc.*, 284 F.2d 599	13
United States v. *Bolts*, 558 F.2d 316	9
United States v. *Bright*, 588 F.2d 504, cert. denied, 440 U.S. 972	12-13
United States v. *Carman*, 577 F.2d 556	7
United States v. *Dixon*, 536 F.2d 1388	7
United States v. *Erickson*, 601 F.2d 296	7
United States v. *Gipson*, 553 F.2d 453	9
United States v. *Head*, 641 F.2d 174	7
United States v. *Murray*, 618 F.2d 892	10
United States v. *Natelli*, 527 F.2d 311, cert. denied, 425 U.S. 934	10

Constitution, statutes and regulation:

United States Constitution, Fifth Amendment	7
Travel Act, 18 U.S.C. 1952	2, 4, 6, 7, 8, 13
18 U.S.C. 1952(a)(3)	6
18 U.S.C. 1952(b)(1)	6
18 U.S.C. 371	2, 6

Constitution, statutes and regulation—Continued Page

Nev. Rev. Stat. (1979):

§ 463.160.1 ..... 5, 7, 8, 10
§ 463.160.1(a) 5, 6
§ 463.290 5
§ 463.335 6
§ 463.339 5
§ 463.360.3 5
§ 463.360.5 5

Nev. Gaming Reg. 3:100 5

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1979

JAMES TAMER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 80-1981

JAMES ABRAHAM, PETITIONER

v.

UNITED STATES OF AMERICA

No. 80-1983

CHARLES GOLDFARB, PETITIONER

v.

UNITED STATES OF AMERICA

No. 80-2024

ALADDIN HOTEL CORP., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a)[1] is reported at 643 F.2d 422. The opinion of the district court issued on January 2, 1979 (Pet. App. 26a-42a) is reported at 464 F.Supp. 565. Other opinions of the district court (Pet. App. 43a-76a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1981 (Pet. App. 77a). Petitions for rehearing were denied on April 1, 1981 (Pet. App. 78a). The petition in No. 80-1979 was filed on May 23, 1981; the petitions in Nos. 80-1981 and 80-1983 were filed on May 26, 1981; the petition in No. 80-2024 was filed on May 29, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a two-and-one-half month jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of conspiracy to violate 18 U.S.C. 1952 (the Travel Act), in violation of 18 U.S.C. 371 (Count IV). Petitioners Goldfarb and Abraham were additionally convicted on one count each of a substantive Travel Act violation (Counts I and III).[2] Abraham was sentenced to con-

---

[1] "Pet. App." refers to the appendix to the petition in No. 80-1979. "J.A." refers to the joint appendix filed in the court of appeals.

[2] Petitioner Tamer was acquitted of a substantive Travel Act charge (Count II). Co-defendant Edward Monazym was convicted of conspiracy and sentenced to three years' probation and a $5,000 fine.

current terms of three years' imprisonment on both counts, all but 90 days of which was suspended in favor of two years' probation and a total fine of $5,000. Goldfarb was sentenced to concurrent terms of three years' imprisonment and a total fine of $20,000. Tamer was sentenced to three years' imprisonment and a $10,000 fine. The Aladdin Hotel Corporation was fined $10,000. The court of appeals affirmed (Pet. App. 1a-25a).

The evidence at trial, the sufficiency of which is not in dispute, is summarized in the opinion of the court of appeals and the district court's opinion denying post-trial motions. Briefly, it showed that in 1971 petitioner Goldfarb and other investors purchased the Aladdin Hotel in Las Vegas, Nevada. Goldfarb then applied to the State Gaming Control Board/Nevada Gaming Commission for a license as a stockholder-officer of the Aladdin Hotel Corporation, which was formed after the acquisition. The Nevada Gaming Commission rejected Goldfarb's application because of his " 'unsuitable background and unsuitable associations' " (Pet. App. 4a). Although Goldfarb thereafter divested himself of his financial interest in the Aladdin Hotel, he continued to maintain a substantial role in both the ownership and operation of the gaming activities (*id.* at 5a). In intercepted telephone conversations, petitioner Abraham, who was the Executive Vice-President and General Manager of the Aladdin, discussed management operations with Goldfarb, in a manner indicating that he recognized Goldfarb's directive authority (*id.* at 5a-6a; J.A. 497A-498H). Goldfarb had a new license application pending in connection with an option to purchase the stock of another Aladdin shareholder, but the pendency of that application did

not authorize his participation in the management of the Aladdin's gaming operations (79-1983 Pet. 2, 8).

There was also evidence indicating that petitioner Tamer performed a significant management function in the casino operation while ostensibly working only as the Hotel's "Entertainment Director." Nevada law bars any individual with a prior criminal record from occupying a "key position" in the operation of casinos. Tamer had a prior conviction for bank robbery. Because Tamer's true position was concealed by his title, his unfitness for that role escaped the scrutiny of the Nevada gaming authorities. Petitioner Tamer was, however, acquitted of the substantive Travel Act offense with which he was charged (Pet. App. 5a, 10a, 66a, 74a-75a).

ARGUMENT

1. Petitioners Goldfarb and Tamer contend (80-1979 Pet. 18-25; 80-1983 Pet. 16-23) that the jury instructions improperly permitted convictions on the Travel Act conspiracy count if the jury found only that they violated a nonpenal state regulation requiring disclosure of the identities of employees directly or indirectly involved in the conduct of gaming operations. Petitioner Goldfarb makes the same argument (80-1983 Pet. 21) with respect to his conviction on the substantive Travel Act count. The contention is without merit because the regulation referred to is incorporated into Nevada statutes, the violation of which is a penal offense.

The state gaming statutes charged as a predicate for the Travel Act offenses make it "unlawful for any person, either as owner, lessee or employee, whether for hire or not, either solely or in conjunction with others," to "operate, carry on, [or] conduct"

gaming operations "without having first procured, and thereafter *maintain*[*ed*] in [full force and] effect, *all* [*necessary*] federal, state, county and municipal *gaming licenses as required by statute or ordinance* * * *." Nev. Rev. Stat. § 463.160.1(a) (1979) (emphasis added). An additional state statutory requirement thereby imposed on those required to be licensed is an obligation to "maintain on file with the commission a current report" that sets forth "such information as may be required by the regulations" of the Nevada Gaming Commission. Nev. Rev. Stat. § 463.290 (1979).[3] Violations of Section 463.160.1 are punishable under state law by imprisonment for a term of one to twenty years, a fine of up to $50,000, or both. Nev. Rev. Stat. § 463.360.3 (1979). Any provision of the gaming statutes for which the penalty is not specifically fixed is punishable as a gross misdemeanor. Nev. Rev. Stat. § 463.360.5 (1979).

Commission regulations require licensees to submit annual reports identifying "every individual who is directly or indirectly engaged in the administration or supervision of the gaming operations" of the licensee, including "individuals who may approve or extend gaming credit in any amount, or whose recommendations in this regard are ordinarily sought or followed." Nev. Gaming Reg. 3:100 (Pet. App. 81a-82a). The failure of the Aladdin to submit such information about Goldfarb therefore violated both Nev. Rev. Stat. § 463.290 and § 463.160.1(a) (1979).

---

[3] In addition, as an applicant for a stockholder's license, Goldfarb was obligated to make full disclosure to state authorities of all information that is necessary to carry out the policies of the State "relating to licensing and control of the gaming industry." Nev. Rev. Stat. § 463.339 (1979).

Moreover, Goldfarb, through his unlicensed involvement in the administration of the Aladdin's gaming operations, in violation of Nev. Rev. Stat. § 463.160.1(a) and § 463.335 (1979), his concealment of that involvement, and his use of interstate facilities, violated the Travel Act because he used interstate facilities to promote an unlawful activity, *i.e.*, a business enterprise involving gambling in violation of state law. 18 U.S.C. 1952(a)(3), (b)(1). All who conspired with Goldfarb in this activity were properly convicted under 18 U.S.C. 371 of a conspiracy to violate the Travel Act.

In sum, although the trial court probably erred in suggesting in its instructions on the conspiracy count (J.A. 1205) that all regulations of the Nevada Gaming Commission have the force of penal law, it was correct insofar as it suggested that the Nevada statutes require that the Commission's reporting requirements be satisfied. The error in the instructions was accordingly immaterial, because the prosecution rested on only those regulations that require the reporting of specified information.[4]

---

[4] Any error in the trial court's instructions with respect to violation of a disclosure requirement is harmless for the additional reason that, in instructing the jury on the substantive count against petitioner Goldfarb, the court expressly required the jury to find (J.A. 1217-1218) either that Goldfarb. had "willfully engaged in the ownership, operation or conducting or carrying on of gaming operations of the Aladdin Hotel" without the required license (*i.e.*, had violated Nev. Rev. Stat. § 463.160.1(a) (1979)) or that he had willfully concealed such actions from the Nevada Gaming Commission, or that he had done both. Under this instruction, the jury would be required to find the willful conduct of gaming operations without proper licensing, even if it made its finding under the concealment branch of the trial court's instruction.

2. Petitioner Goldfarb contends (80-1983 Pet. 6-16) that the trial court's instructions amounted to a constructive amendment of the indictment, in violation of the Fifth Amendment, by diverging from the theory of illegality underlying the indictment (although not presenting him with new factual allegations to contest). Specifically, he argues (Pet. 8-12) that neither the indictment, nor the prosecution in its responses to motions to dismiss the indictment,

---

Thus, regardless of whether the concealment offense involved only a violation of nonpenal regulations, the jury's verdict necessarily represents a finding that Goldfarb violated Section 463.160.1 of the Nevada gaming statutes. (And because the trial court instructed the jury that it had to make one or both of those findings to convict Goldfarb on the substantive count, it is immaterial that the court also advised the jury (J.A. 1215) to "keep in mind" instructions on the conspiracy count in which the court had defined "unlawful activity.") The charge on the substantive count against petitioner Abraham emphasized that he was essentially accused of aiding and abetting Goldfarb's offense (J.A. 1227, 1229).

The charge on the substantive count against petitioner Tamer relied more heavily on the Commission's regulations (J.A. 1221-1223), but the jury acquitted Tamer on that count. Because the jury convicted on the substantive counts in which they were expressly required by the court to find a violation of Nev. Rev. Stat. § 463.160.1 and acquitted Tamer on the substantive count against him, one may logically deduce that it must have found a Travel Act conspiracy based on a violation of Nev. Rev. Stat. § 463.160.1 (1979). Hence, the conviction on the conspiracy count was properly upheld even if the instructions would also have permitted the jury to convict for a conspiracy to violate a regulation. Compare, *e.g.*, *United States* v. *Erickson*, 601 F.2d 296, 303 (7th Cir. 1979), and *United States* v. *Dixon*, 536 F.2d 1388, 1401-1402 (2d Cir. 1976), with *United States* v. *Head*, 641 F.2d 174, 178-179 (4th Cir. 1981), and *United States* v. *Carman*, 577 F.2d 556, 566-568 (9th Cir. 1978).

had proceeded on a theory that a violation of the regulations alone was a sufficient predicate for a Travel Act violation, but that the trial court's instructions reflected such a theory. He also contends (Pet. 14-15) that the trial court, contrary to the indictment, allowed petitioner to be convicted for merely exercising "significant," but unreported, "control and influence" over gaming.

The arguments are not well taken. First, as explained above, the allegations in the indictment that petitioner Goldfarb used interstate facilities in the course of promoting the conduct of gaming operations in violation of Nev. Rev. Stat. § 463.160.1 (1979), by the terms of the statute, encompass violations of the Commission's regulations pertaining to disclosure. The trial court's instructions thus did not diverge in any significant way from the indictment. Furthermore, as we have also explained above (pages 6-7, note 4, *supra*), the trial court's instructions expressly required the jury to find that petitioner Goldfarb conducted gaming operations without proper licensing, in violation of Section 463.160.1, in order to convict him of the Travel Act offense.

Second, contrary to petitioner's contention (80-1983 Pet. 14), the trial court's instructions did not permit his conviction upon a jury finding that he had exercised control and influence to the same degree as might be true of any large bettor or person who refers friends to a casino. The trial court's instructions (J.A. 1215-1216) plainly indicated that the reporting requirements concerned persons who functioned as gaming employees or who had ownership interests and, as noted, they required a jury finding that Goldfarb engaged in the ownership, operation, conducting, or carrying on of gaming operations at the Alad-

din. Thus, the concept of significant control and influence over gaming was effectively limited in application to persons in positions of actual authority, as the proof showed Goldfarb to be.

3. Petitioners further contend (80-1979 Pet. 12-18; 80-1983 Pet. 23-26) that, by instructing the jury with respect to the conspiracy count (J.A. 1205-1208) that it could convict if it found either a conspiracy to promote the conduct of gaming operations by an unlicensed person or a conspiracy to conceal someone's exercise of control or influence over gaming operations, and by giving only a general unanimous verdict instruction, the trial court denied petitioners their right to a unanimous jury verdict. Petitioners' theory is that some jurors may have concluded that there was a conspiracy with respect only to the first object and others may have predicated their vote on a finding that petitioners conspired with respect only to the second object.

Petitioners rely chiefly on *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977), in making this argument. But as the Fifth Circuit later explained in *United States* v. *Bolts*, 558 F.2d 316 (1977), "*Gipson* involved a situation where the court expressly sanctioned a non-unanimous verdict: the jurors were told that they could disagree as to what particular prohibited acts were committed, as long as each juror found that one of the acts had been done" (558 F.2d at 326 n.4; citation omitted). The trial court here advised the jurors that their verdict must be unanimous (J.A. 1232-1233). Their verdict should not be overturned because of the possibility that some jurors disobeyed or misunderstood that instruction. "It is assumed that a general instruction on the requirement of unanimity suffices to instruct the jury that

they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict." *United States* v. *Natelli*, 527 F.2d 311, 325 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976), cited in *United States* v. *Murray*, 618 F.2d 892, 898 (2d Cir. 1980).

In any event, because, as explained above (pages 6-7, note 4), it seems likely that the jury must have found a conspiracy to violate the licensing statute, Nev. Rev. Stat. § 463.160.1 (1979), this is not, as petitioner Tamer suggests (80-1979 Pet. 13), an appropriate case in which to resolve any disagreement that might exist among the circuits on the question of what instructions are necessary to ensure a unanimous verdict on a count charging a conspiracy with multiple objects.

4. Petitioner Abraham contends (80-1981 Pet. 13-18) that the trial court abused its discretion in denying a mistrial after the government cross-examined a defense character witness on a specific act of misconduct that Abraham was alleged to have committed.

In his defense Abraham presented several character witnesses, the last being one Carl E. Lovell, Jr., former City Attorney of Las Vegas. Although he had no law enforcement duties as City Attorney, Lovell testified that petitioner enjoyed a good reputation with Nevada's " 'law enforcement community' " (Pet. App. 23a). At a side bar conference during cross-examination of Lovell, the government sought permission to question Lovell as to whether he knew that petitioner had personally accepted payments from a corporation seeking to lease space within the Aladdin Hotel. In a lengthy mid-trial hearing on the propriety of that line of questioning, the govern-

ment proffered to the court a check for $1,000 and presented its evidence that the check constituted a bribe (J.A. 985-1026, 1035-1052). Finding a good faith basis for the question, the court permitted the government to ask it for the purpose of impeaching Lovell's character testimony; but it cautioned the jury beforehand that "these [upcoming] questions will be permitted for the sole and limited purpose of testing Mr. Lovell's knowledge of Mr. Abraham's reputation in the Las Vegas community during [*sic*] the Las Vegas business world and they are to be considered by you only for the purpose of testing the credibility of Mr. Lovell who has given character or reputation testimony about the defendant Abraham. You will consider it for no other purpose" (J.A. 1079). When asked, Lovell said he had not heard of such an incident (J.A. 1080).

The government then sought to introduce evidence of the $1,000 payment and petitioner's failure to declare the payment as income on his tax return. After another lengthy hearing and proffers by both sides (J.A. 1083-1142),[5] the court suggested that permitting this evidence as rebuttal to Lovell's character testimony and then additional surrebuttal evidence for petitioner would result in a "mini-trial within the trial for the jury on other acts" (J.A. 1140).

---

[5] Petitioner mistakes the record in arguing (80-1981 Pet 8) that the only basis for the question was the mere existence of the check made payable to him. In fact, the person who wrote the check on behalf of the concessionaire testified that he paid petitioner to assure that if they had subsequent problems they could go to him for help (J.A. 1100). Moreover, the numerical sequence on the checks relating to the Aladdin lease and the check to petitioner suggested that the latter transaction might be linked to the former.

Accordingly, the court refused to permit the government to offer evidence of the $1,000 payment.[6] At that point the government moved to withdraw the question (J.A. 1142). The court agreed, and instructed the jury that the questions asked of Lovell concerning payments allegedly made to petitioner by persons seeking space at the Aladdin were withdrawn and that the jury should thus disregard the questions and answers (J.A. 1150). The court declined to instruct the jury in addition that the question had no basis in fact.

Petitioner does not challenge the traditional rule that permits cross-examination of a character witness by asking him if he has heard of prior instances of a defendant's misconduct that are inconsistent with the reputation testimony. *Michelson* v. *United States*, 335 U.S. 469 (1948). Rather, petitioner suggests that the court erred in allowing the question without a good-faith factual basis. The record belies that claim. The prosecutor proffered both the check itself, which was drawn at the same time and in sequence with rent checks payable to the Aladdin Hotel, and the testimony of the check's signer to the effect that the check was given in exchange for cooperation with the concessionaire. That proffer provided a sufficient factual basis for the question. *United States* v.

---

[6] Thus, petitioner errs in characterizing the court's decision as a finding that the "charge of 'bribe[ry]' was without any basis in fact" (80-1981 Pet. 10). Rather, the court chose to exclude further evidence because two defense witnesses testified inconsistently with the writer of the check, and the court dclined to permit another credibility issue to be presented to the jury (J.A. 1140-1142).

Bright, 588 F.2d 504, 512 (5th Cir.), cert. denied, 440 U.S. 972 (1979).[7]

5. Petitioner Aladdin Hotel Corporation contends (80-2024 Pet. 6-8) that a corporation may not be convicted of a conspiracy with its own officers and agents who are acting on behalf of the corporation. The contention is unsound.

Nelson Radio & Supply Co. v. *Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953), and *Poller* v. *Columbia Broadcasting System, Inc.*, 284 F.2d 599 (D.C. Cir. 1960), relied on by petitioner (80-2024 Pet. 7-8), do not mandate a contrary result. In those private lawsuits to enforce civil antitrust laws, the courts suggested that conspiracies in restraint of trade must extend beyond the limits of the corporation. *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, *supra*, 200 F.2d at 914. That is so because the antitrust laws are directed at the "joint action of two or more persons in combining their economic power and restricting competition." *Poller* v. *Columbia Broadcasting System, Inc.*, *supra*, 284 F.2d at 603. That analysis does not, however, necessarily apply to conspiracies to commit criminal offenses—such as the Travel Act offenses and underlying state offenses concerned here—out-

[7] Petitioner asserts (80-1981 Pet. 15-18) that decisions of the Fifth Circuit and the District of Columbia Circuit conflict with those of the Sixth Circuit with respect to the exercise of judicial discretion in permitting impeachment by reference to specific instances of misconduct. Even if the former circuits have a more stringent standard, however, this case does not present a proper vehicle for consideration of the alleged conflict. The court's actions here fully complied with the recommended procedures in the Fifth Circuit and District of Columbia Circuit.

side the antitrust area. There is nothing novel in charging a corporation, along with its officers or employees, of conspiring to commit a criminal offense (see, *e.g.*, *Nye & Nissen* v. *United States*, 336 U.S. 613, 614-615 (1949); *Egan* v. *United States*, 137 F.2d 369 (8th Cir.), cert. denied, 320 U.S. 788 (1943); *Mininsohn* v. *United States*, 101 F.2d 477, 478 (3d Cir. 1939)), and petitioner Aladdin has cited no authority or justification for applying the rule of the cases it cites in cases not involving violations of antitrust laws.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SARA B. CRISCITELLI
Attorney

AUGUST 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 351725 575